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and as to defendant's abuse of the land in the interim. Held, that as the question of the validity of the contract had long since been adversely determined, and as complainants had refused defendant's offer, and it had been withdrawn, they were not entitled to a review of the original decree.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1078; Dec. Dig. § 445.\* 5 Va.-W. Va. Enc. Dig. 137.]

**8. Appeal and Error (§ 1151\*)—Determination—Authority of Appellate Court.**—Where the report of the commissioner and the papers in the cause showed that complainants, against whom relief was granted on the cross-bill, were liable for interest from a given time, the Supreme Court may, under the direct provisions of Code 1904, § 3451, make the correction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4506; Dec. Dig. § 1151.\* 1 Va.-W. Va. Enc. Dig. 540.]

Appeal from Circuit Court, Fauquier County.

Bill by I. B. Bryant, committee of G. G. Bryant, and another against Jacob W. Goode, who filed a cross-bill. There were decrees for defendant on his cross-bill, and from a decree on complainants' bill in the nature of a bill of review, modifying the original decrees, defendant appeals, and complainants assign cross-errors. Reversed.

*R. A. McIntyre, of Warrenton, and Bumgardner & Bumgardner, of Staunton, for appellant.*

*J. A. C. Keith, of Warrenton, for appellee.*

NORFOLK & W. RY. CO. v. SINK'S EX'R.

Jan. 13, 1916. Rehearing Denied Feb. 2, 1916.

[87 S. E. 740.]

**1. Railroads (§ 348\*)—Injury on Crossing—Sufficiency of Evidence—Contributory Negligence.**—Evidence in an action for the death of plaintiff's testatrix, killed on defendant's track at a crossing, held to warrant a finding that deceased was guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.\* 11 Va.-W. Va. Enc. Dig. 597.]

**2. Trial (§ 253\*)—Instructions.**—In an action for negligence of defendant railroad, an instruction that plaintiff must establish the negligence alleged was not erroneous as excluding from the consideration of the jury any evidence of defendant to that effect.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\* 7 Va.-W. Va. Enc. Dig. 718.]

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

**3. Trial (§ 252\*)—Instructions.**—In an action for the death of plaintiff's testatrix at a crossing, where there were two gates across the street, one to the west and one to the east, in which the evidence showed that the east gate was down, and tended to show that the west gate was also down, and that deceased stooped under it in approaching the track, an instruction that defendant's failure to have the west gate down when its engine and tender approached at the time of the accident did not relieve deceased from exercising care in attempting to cross the tracks, and that it was her duty before attempting to cross to look in both directions and listen for approaching trains, and that, if she did not do so, and went on the tracks in a position to be struck by the tender, she was guilty of contributory negligence precluding a recovery, was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 503, 596-612; Dec. Dig. § 252.\* 7 Va.-W. Va. Enc. Dig. 718.]

**4. Railroads (§ 351\*)—Accident at Crossing—Gates—Contributory Negligence.**—Assuming that the western gate was up, an instruction that, if deceased passed on to the crossing through such open gate, she was negligent if she saw, or by ordinary care could have seen, that the other gate was down, and that, if she continued, she was guilty of contributory negligence defeating a recovery, unless the defendant's servants in charge of its engine discovered, or in the exercise of ordinary care could have discovered, her peril in time by ordinary care to have avoided injury, was proper.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193-1211, 1213-1215; Dec. Dig. § 351.\* 11 Va.-W. Va. Enc. Dig. 591.]

**5. Railroads (§ 351\*)—Injury at Crossing—Negligence—Presumption and Burden of Proof.**—An instruction that the fact that plaintiff was struck by defendant's tender raised no presumption of defendant's negligence, but the burden was on plaintiff to show by a preponderance of evidence that defendant was guilty of negligence in one or more of the particulars charged, which was the sole proximate cause of the accident, was not erroneous as eliminating the last clear chance doctrine; it not being applicable to such conditions.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193-1211, 1213-1215; Dec. Dig. § 351.\* 11 Va.-W. Va. Enc. Dig. 597.]

**6. Railroad (§ 350\*)—Injury at Crossing—Contributory Negligence.**—Where the defendant's evidence tended to show that both the east and west gates at its street crossing were down, and that deceased got under the west gate and crossed over to the east track, and that the gate near that track was in full view had she looked, she was guilty of negligence as a matter of law, and, if injured by reason of going to the east track, could not recover, unless the jury found that defendant's servants discovered, or by the exercise of ordinary care

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

could have discovered, her peril in time by the exercise of ordinary care to have avoided injuring her.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\* 11 Va.-W. Va. Enc. Dig. 597.]

**7. Railroads (§ 320\*)—Accident at Crossing—Negligence.**—Where deceased was in full view of defendant's engine and tender backing toward the crossing, the engine crew had the right to presume that she would stop before she reached that track, and were not bound to stop until they saw, or by ordinary care could have seen, that she did not intend to stop and was in danger of being struck, and, if thereafter they used ordinary care to avoid injury, defendant was not liable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1014-1016, 1019; Dec. Dig. § 320.\* 11 Va.-W. Va. Enc. Dig. 570.]

**8. Railroads (§ 351\*)—Accident at Crossing—Negligence.**—Where it appeared that after plaintiff's decedent had been struck and injured it was difficult to extricate her from the engine, and that the engine crew had honestly attempted to avoid the accident, an instruction that, if the accident was the result of decedent's own negligence in going on the track, defendant was not liable if those in charge of its engine, acting in the emergency in getting her from under the engine after she was struck, did what they then thought was the best thing to do and exercised ordinary care, even though it resulted in further injury, was not objectionable as denying a recovery on the ground of such additional injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193-1211, 1213-1215; Dec. Dig. § 351.\* 11 Va.-W. Va. Enc. Dig. 570.]

**9. Appeal and Error (§ 1175\*)—Disposition—Review.**—Under Code 1904, § 3484, requiring the Supreme Court of Appeals to look first to the evidence and proceedings of the first trial, and, if discovering error in setting aside the verdict on that trial, to set aside all proceedings subsequent to verdict, and to enter judgment thereon, the court, after verdict for defendant had been set aside and judgment rendered for plaintiff in a second trial, finding that the court correctly instructed the jury on the first trial, and that the evidence was sufficient to sustain its verdict for defendant, will set aside the judgment in the second trial and the order granting a new trial and enter judgment for defendant on the first verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.\* 1 Va.-W. Va. Enc. Dig. 578.]

#### Error to Corporation Court of Roanoke.

Action by D. Saylor Good, executor of Mrs. Flora Sink, deceased, against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.